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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 39

JAMES MONROE et al.,

Petitioners,

vs.

FRANK PAPE et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit.

Respondents' Brief.

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Summary of Argument.

Petitioners' complaint fails to state a Civil Rights Act cause of action because the acts complained of were not committed under color of law, custom or usage.

The Fourteenth Amendment and the Civil Rights Act are directed against state action aimed at depriving persons of their civil rights. Action of police officers that violates the Constitution and laws of Illinois and the ordinances of the City of Chicago is not state action that deprives anyone of his civil rights.

The wrongful conduct complained of in the case at bar, starting with the alleged breaking into of petitioners'

home without a warrant and the subsequent alleged misconduct, constituted a series of private torts redressable under state law but not under the Civil Rights Act.

Although the complaint alleges that the acts complained of were under color of law, the specific acts averred contradict this general allegation and show that such acts were committed contrary to all state laws and city ordinances.

Petitioners' rights may have been "invaded", "violated", or "disregarded", but petitioners have not been "deprived" of them, because the wrongs alleged were committed against petitioners without state or city authority and in direct contravention of all state laws and city ordinances.

The rule of law laid down by this court in *Screws* v. *United States*, 325 U. S. 91, and *Williams* v. *United States*, 341 U. S. 97, holding that actions by police officers, even though in contravention of state law, is under color of law or pretense of law should be held inapplicable or should be overruled because such holding is not in conformity with the object of the Fourteenth Amendment and the Civil Rights Act based upon such amendment.

The allegations in the complaint as to custom and usage are insufficient to support a Civil Rights Act cause of action because they do not show that any of the alleged customs and usages were either promulgated, sanctioned, encouraged, or even tolerated by anyone in official authority, or that police officers of Chicago could violate the constitutional or legal rights of persons without being subjected to adequate punishment under local law.

The allegations in the complaint, as to custom and usage, are contrary to the laws of Illinois and the ordinances of Chicago and, therefore, void. No Civil Rights Act cause of action can be based on such alleged void custom and usage.

The failure to include "willfulness" as an ingredient of liability in R. S. sec. 1979 (42 U. S. C. A. sec. 1983), upon which petitioners rely for their civil rights cause of action, renders such action void for indefiniteness (*Screws* v. *U. S.*, 325 U. S. 91, 97-98).

The respondent City of Chicago is not responsible for acts of its police which are in contravention of the constitution and laws of Illinois and the ordinances of Chicago because such acts are ultra vires and beyond the scope of police employment.

Section 1-15 of the Illinois Revised Cities and Villages Act which removes governmental function immunity from the City of Chicago for the acts of its police in performance of their police duties, except for acts of "wilful misconduct", confirms the defense of ultra vires and beyond scope of police employment rule of law.

Argument.

I.

Petitioners' complaint fails to show that respondent Frank Pape was acting under color of law, or pursuant to any custom or usage having the force of law; therefore, it does not state a cause of action under the Civil Rights Act against said respondent.

A.

Petitioners' complaint fails to show that respondent Frank Pape was acting under color of law.

Petitioners' argument is based on the erroneous premise that a "violation" of rights guaranteed by the Fourteenth Amendment gives rise to a Civil Rights Act cause of action (Petitioners' Brief, p. 10).

Section 1983 of the Civil Rights Act protects against state action resulting in "deprivation" of due process rights guaranteed by the Fourteenth Amendment and not against "violation" of such rights by individual action.

In the case at bar, the most that the complaint alleges is false arrest, assault, unreasonable search, and false imprisonment.

Every one of the alleged acts charged against respondent Pape is in violation of the Constitution and laws of the State of Illinois and the ordinances of the City of Chicago.

There is nothing in petitioners' complaint showing that Pape's alleged actions were pursuant to any State or City law. The mere allegation in the complaint that Pape's actions were under color of law is not sufficient to support a Civil Rights Act cause of action (*Yglesias* v. *Gulfstream Park Racing Assn.*, 5 Cir., 201 F. 2d 817, 818, citing *Bell* v. *Hood*, 327 U. S. 678, certiorari denied 345 U. S. 993).

The Constitution of Illinois, art. II, sec. 2, provides:

> "No person shall be deprived of life, liberty or property, without due process of law." (Ill. Rev. Stat. 1959, v. 1, p. 9.)

The Constitution of Illinois, art. II, sec. 6, provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized." (Ill. Rev. Stat. 1959, v. 1, p. 9.)

Illinois has a false imprisonment statute which provides:

> "False imprisonment is an unlawful violation of the personal liberty of another, and consists in confinement or detention without sufficient legal authority. Any person convicted of false imprisonment shall be fined in any sum not exceeding $500, or imprisonment not exceeding one year in the county jail" (Ill. Rev. Stat. 1959, chap. 38, par. 252).

Illinois has a statute entitled "An Act in relation to the holding of persons in custody without their being able to notify their families or to have legal assistance" which provides:

> "Whoever shall, while holding another person in custody, deny that other person his right to consult and be advised by an attorney at law, whether or not such person is charged with a crime; and whoever shall prevent another person held in custody from notifying his family within 24 hours of the fact that he is being so held, shall be fined not less than $100 nor more than $1000 or shall be imprisoned for not less than ten days nor more than six months, or both" (Ill. Rev. Stat. 1959, chap. 38, par. 449.1).

Section 11-24 of the Municipal Code of Chicago at the time in question provided:

> "The members of the police force of the city, when on

duty, shall devote their time and attention to the discharge of the duties of their stations, according to the laws of the state and ordinances of the city and the rules and regulations of the department, to preserve order, peace, and quiet and enforce the laws and ordinances throughout the city."

Section 11-25 of the Municipal Code of Chicago at the time in question provided:

"The members of the police force shall have power to arrest all persons in the city found in the act of violating any law or provision of this code or aiding and abetting in any such violation, and shall arrest any person found under circumstances which would warrant a reasonable man in believing that such person had committed or is about to commit a crime."

Section 11-40 of the Municipal Code of Chicago at the time in question provided:

"All complaints of citizens regarding officers and members of the department of police shall be investigated promptly and thoroughly. The substance of all oral complaints and copies of written complaints received at the police stations, and by the various bureaus, divisions, and sections of the service, shall be forwarded promptly to the commissioner of police."

In addition to the foregoing safeguards against the violation of civil rights Illinois has a Post-Conviction Hearing Act entitled "An Act to provide a remedy for persons convicted and imprisoned in the penitentiary, who assert that rights guaranteed to them by the Constitution of the United States or the State of Illinois, or both, have been denied or violated, in proceedings in which they were convicted" (Ill. Rev. Stat. 1959, chap. 38, pars. 826-832) and provides (Ill. Rev. Stat. 1959, chap. 38, par. 832):

"Any final judgment entered upon such a petition [post-trial petition to review conviction] may be reviewed by the Supreme Court on writ of error brought within six months from the entry of the judgment."

Besides, evidence illegally seized by state officers is not admissible in Illinois (*Elkins* v. *United States*, 364 U. S. 206, 227).

The foregoing constitutional provisions, statutes, laws, and ordinances establish the total absence of any sanction by the State of Illinois or the City of Chicago of Pape's alleged misconduct. Pape, although a police officer, neither acted nor purported to act under color of any law, but occupied the status of a private tortfeasor. We shall deal later with the allegations of the complaint that Pape committed the wrongs complained of while acting under color of the customs and usages of the State of Illinois, County of Cook, and City of Chicago (R. 2).

It is well settled that to bring the alleged wrongs of Pape within the purview of the Civil Rights Act they must have been committed under color of law or pursuant to regulation, custom or usage having the force of law. In other words, there must either be a law of the state or city authorizing such misconduct, or a regulation, custom or usage, sanctioned by the state or city, pursuant to which the wrongs are perpetrated. Otherwise, the misconduct cannot properly be attributed to the state or its municipal subdivisions. No rule of law is better established than that the Civil Rights Act does not protect against the commission of wrongs by private action.

In *United States* v. *Cruikshank*, 92 U. S. 542, this court enunciated the doctrine that the Fourteenth Amendment does not protect persons from wrongs committed against them by private action but only against abridgment of their constitutional rights by the states. This court pointed out that this limitation applies both to the due process clause and the equal protection clause of the Fourteenth Amendment. With respect to the due process clause, this court said (pp. 553-554):

"The third and eleventh counts are even more ob-

jectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, 'of their respective several lives and liberty of person without due process of law.' This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the State of Louisiana. The rights of life and personal liberty are natural rights of man. 'To secure these rights,' says the Declaration of Independence, 'governments are instituted among men, deriving their just powers from the consent of the governed.' The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these 'unalienable rights with which they were endowed by their Creator'. Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.

"The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society."

With respect to the equal protection clause, this court said (pp. 554-555):

"The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, anymore than the one which precedes it, and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the en-

joyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. *The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.*" (Emphasis added).

Civil Rights Cases, 109 U. S. 3, involved the first and second sections of the Civil Rights Act passed March 1, 1875. Section one provided, "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations * * * of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." Section two provided civil and criminal penalties. It was held said sections were beyond the power of congress to enact under the Fourteenth Amendment. This court held that said enactments must find their authority in the first section of the Fourteenth Amendment, saying (p. 11):

> "*It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope.* It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and

State acts, and thus to render them effectually null, void and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. * * * Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect of the amendment may be found in *United States* v. *Cruikshank*, 92 U. S. 542; *Virginia* v. *Rives*, 100 U. S. 313; and *Ex parte Virginia*, 100 U. S. 339" (Emphasis added).

This court further said (p. 17):

"*In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress.* An individual * * * may commit an assault against the person, or commit murder, or use ruffian violence at the polls * * *; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefore to the laws of the State where the wrongful acts are committed. *Hence, in all those cases where the Constitution seeks to pro-*

tect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some State law or State authority for its excuse and perpetration" (Emphasis added).

This court further said (p. 23):

"We must not forget that the province and scope of the Thirteenth and Fourteenth amendments are different; the former simply abolished slavery; the latter prohibited the States from abridging the privileges or immunities of citizens of the United States; from depriving them of life, liberty, or property, without due process of law, and from denying to any the equal protection of the laws. * * * Under the Fourteenth amendment, it [Congress] has power to counteract and render nugatory all State laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States or to deprive them of life, liberty or property without due process of law, or to deny to any of them the equal protection of the laws. Under the Thirteenth amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating on the acts of individuals, whether sanctioned by State legislation or not; under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings."

In *Douglas* v. *City of Jeannette*, 319 U. S. 157, in interpreting the Fourteenth amendment, this court said (p. 162):

"* * * Allegations of fact sufficient to show depriva-

tion of the right of free speech under the First Amendment are sufficient to establish deprivation of a constitutional right guaranteed by the Fourteenth, and to state a cause of action under the Civil Rights Act, *whenever it appears that the abridgement of the right is effected under color of a state statute or ordinance*" (Emphasis added).

In *Snowden* v. *Hughes*, 321 U. S. 1, this court interpreted 8 U. S. C. A. section 43, presently 42 U. S. C. A. section 1983, the statute involved herein. Petitioner there claimed that the respondents, the Illinois State Primary Canvassing Board, illegally refused to certify him as a candidate for state representative. Petitioner claimed damages for a violation of his civil rights. In affirming the United States Court of Appeals for the Seventh Circuit which had affirmed the District Court's dismissal of petitioner's suit, this court said (p. 7):

"• • • The denial alleged is of the right of petitioner to be a candidate for and to be elected to public office upon receiving a sufficient number of votes. The right is one secured to him by state statute and the deprivation of right is alleged to result solely *from the Board's failure to obey state law. There is no contention that the statutes of the state are in any respect inconsistent with the guaranties of the Fourteenth Amendment. There is no allegation of any facts tending to show that in refusing to certify petitioner as a nominee, the Board was making any intentional or purposeful discrimination between persons or classes.*" (Emphasis added.)

In *Collins* v. *Hardyman*, 341 U. S. 651, this court, quoting from *Shelley* v. *Kramer*, 334 U. S. 1, 13, said (p. 658):

"'Since the decision of this Court in the *Civil Rights Cases*, 109 U. S. 3 (1883), the principle has become firmly imbedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said

to be that of the States. That amendment erects no shield against merely private conduct, however discriminatory or wrongful.'

"And Mr. Justice Douglas, dissenting, has quoted with approval from the *Cruikshank* case, 'The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it * * * add anything to the rights which one citizen has under the Constitution against another.' 92 U. S. at pp. 554-555 and 'The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.' He summed up: 'The Fourteenth Amendment protects the individual against *state action*, not against wrongs done by *individuals* * * *.'"

It is clear from the foregoing cases, that the Civil Rights Act enacted pursuant to the Fourteenth Amendment can only reach state action, and that misconduct by public officials not sanctioned by the State, and indeed contrary to its laws, is not State action within the Fourteenth Amendment. If such misconduct is not State action within the Fourteenth Amendment, it cannot be within the purview of the Civil Rights Act.

The mere fact that respondent Pape was a police officer does not establish he acted under state or city sanction. For Pape's conduct to come within the protection of the Fourteenth Amendment, it must be shown to have rested "upon some State Law or State authority for its excuse and perpetration." (*Civil Rights Cases*, 109 U. S. 3, 18.)

That Pape's conduct did not rest upon state or city authority or sanction is further established by the express disclaimer of city responsibility for the wilful misconduct of police officers found in section 1-15 of the Re-

vised Cities and Villages Act of Illinois (Ill. Rev. Stat. 1959, chap. 24, par. 1-15). That statute imposes upon the City of Chicago the obligation to indemnify its police officers for judgments recovered against them arising out of injuries resulting from the performance of their police duties, but it expressly excepts cases involving "wilful misconduct" by such police officers. The complaint herein alleges a clear case of "wilful misconduct" by Pape with respect to all of the alleged wrongs perpetrated by him against petitioners.

Under the allegations of the complaint, Pape stands as a private individual who has committed wilful and intentional wrongs unsanctioned and unexcused by any state or city law. From this it follows that petitioners have not stated a case within the Fourteenth Amendment or section 1983 of the Civil Rights Act under color of law.

Petitioners' brief rests on the erroneous assumption that every act of a police officer that violates the rights guaranteed by the Fourteenth Amendment gives rise to a Civil Rights Act cause of action because every police officer acts under color of law. We have demonstrated that this court has uniformly held that such is not the law and that the United States Courts of Appeals, with few exceptions have held the same way (Appendix G, Petition for Writ of Certiorari; Brief for Respondent in Opposition, pp. 5-8).

The two cases that petitioners rely upon for their theory that every act of a police officer that violates rights guaranteed by the Fourteenth Amendment is under color of law and, therefore, constitutes state action are *Williams* v. *United States*, 341 U. S. 97, and *Screws* v. *United States*, 325 U. S. 91 (Petitioners' Brief, p. 10).

Respondents submit first that the facts in those cases are different from the facts in the case at bar so that

the holdings in those cases would not apply in the case at bar; and, second, that what this court held in those cases as to the acts of the police being under color of law, should be overruled.

As to the facts in the case at bar, the search of petitioners' home, petitioner James Monroe's arrest and the alleged assaults on petitioners are not shown by the complaint to be based on any legal warrant or process. In fact, the complaint only states that after James Monroe was arrested, he was held ten hours, during which time he was placed in "show-ups" and questioned about a murder (R. 6). He later was released without a charge being placed against him (R. 7). There is in the complaint a total lack of showing of any legal justification for the acts of respondent Pape or that said acts were based on any valid legal duties that Pape was carrying out. In fact, such acts were contrary to all legal duties Pape was subject to.

As to the facts in the *Screws* case, this court pointed out that the acts complained of were initiated by a lawful arrest (*i. e.*, an arrest on a warrant charging theft of a tire—325 U. S. 92); and further, that the defendants admitted that the assault and battery were committed to protect themselves, and to make the arrest effective, *i. e.*, to keep the prisoner from escaping which "was a duty they had under Georgia law" (p. 110); that, certainly, the defendants assumed and "pretended" to act under color of law, and that under "color" of law means under "pretense" of law (p. 111).

As to the facts in the *Williams* case, the defendants were convicted of employing brutal methods to extort confessions from persons suspected of theft. This court upheld the conviction by a 5 to 4 decision. This court held that the misconduct consisted not merely of a simple assault

and battery but of the infliction of violence to *extort a confession* (pp. 101-102). This court said that while the indictment charged that the "illegal" assault and battery constituted a deprivation of the victim's rights and privileges secured by the Fourteenth Amendment, it was clear from the context of the indictment, and from the particular misconduct charged, that the right charged to have been violated was "*immunity from the use of force and violence to obtain a confession*" (pp. 102-103—emphasis by this court). The case at bar does not involve violence to obtain a confession.

As to the law in the *Screws* case, in their dissenting opinion, Justices Robert, Frankfurter and Jackson (325 U. S. pp. 138-161), challenged the conclusion that conduct by state officials in defiance of state law constitutes action by the state or under "color of law". The minority opinion pointed out that the Fourteenth Amendment prohibits a state from so acting as to deprive persons of the new federal rights defined by it, but that action by state officials in direct contradiction to state law is not within federal protection but must be dealt with by the states alone (p. 141).

The minority opinion further pointed out that Congress never intended that federal authority should be exerted against offenders of state authority, whether such offenders be private persons or local officials (p. 142).

The three justices traced the history of civil rights statutes and concluded that "this legislation was confined to attempted deprivations of federal rights by state law and was not extended to breaches of state law by its officials * * *." (p. 143.)

The minority opinion then declared (p. 144):

"* * * And to have provided for the National Government to take over the administration of criminal

> justice from the States to the extent of making every lawless act of the policeman on the beat or in the station house, whether by way of third degree or the illegal ransacking for evidence in a man's house * * * a Federal offense, would have constituted a revolutionary break with the past overnight. The desire for such a dislocation in our Federal system was plainly not contemplated * * *."

The minority opinion further pointed out (pp. 147-148):

> "* * * It has never been satisfactorily explained, how a State can be said to deprive a person of liberty or property without due process of law when the foundation of the claim is that a minor official has disobeyed the authentic command of the State."

As to the law in the *Williams* case, the conviction for extorting a confession by violence was upheld by a 5 to 4 decision. Justices Jackson, Frankfurter, and Minton dissented on the grounds: (1) that Section 20 prescribed a standard of liability too vague for validity; and (2) that the statute was never designed to cover a wrongful use of power by a state official.

Acts of violence by police officers to extort a confession are against the laws of Illinois. Such a confession is not admissible in evidence. Since it is not admissible in evidence, the person from whom it was extorted is protected by the laws of Illinois. Therefore, the State of Illinois has not deprived him of any rights guaranteed by the Fourteenth Amendment. The illegal acts of the offending police officers violated his rights but could not under any circumstances deprive him of his rights.

This difference between violation of rights and deprivation of rights by state action must be kept in mind at all times. It is the confusing of "violation" with "deprivation" by state action by judicial decision, that has er-

roneously extended federal jurisdiction to actions that belong solely to the states.

Petitioners have mistakenly assumed that the "violation of rights" by wrongful conduct and the "deprivation of rights by state action" are the same. They have devoted most of their brief to this confused theory. They think that any violation by a police officer of a right guaranteed by the Fourteenth Amendment is tantamount to a deprivation of such right by state action. This is not so.

Perhaps petitioners' rights were invaded, disregarded and lawlessly violated, but neither their rights nor their equality of rights under the laws of Illinois and the ordinances of Chicago, have been or could be denied, or impaired. Nor could petitioners be deprived of such rights by totally illegal action.

Petitioners' Point 1 (Petitioners' Brief, p. 10) states:

> "The Fourteenth Amendment Due Process Rights of Petitioners Were Violated by the Unreasonable Search and Seizure Alleged in the Complaint."

This statement is erroneous because respondent Pape seized nothing belonging to petitioners and there is no allegation in petitioners' complaint stating any seizure. Besides, the statement states no cause of action under the Civil Rights Act, 42 U. S. C. A. sec. 1983, because a "violation" of due process rights is not protected by such act. Section 1983 protects against state action resulting in "deprivation" of due process rights.

Petitioners seek to impress this court with the importance of civil rights and their need for protection. Respondents have no quarrel with such sentiments but the issue in this case is not the importance of civil rights and their protection but whether acts of a police officer in violation of state and city law is state action protected by the Fourteenth Amendment.

Respondents submit that this court should follow the minority opinion of the *Screws* and *Williams* cases, which is supported by the civil rights cases decided before them and heretofore shown, and hold that conduct by state officials, police or otherwise, in defiance of the Constitution and laws of Illinois and the ordinances of Chicago, does not constitute State action or action under color of law or pretense of law against which the Fourteenth Amendment and the Civil Rights Act are directed.

Petitioners' Point 2 (Petitioners' Brief, p. 13) states:

> "The Availability of State Judicial Remedies for the Wrongs Alleged in the Complaint Does Not Bar Petitioners' Federal Remedy Conferred by the Civil Rights Act."

Petitioners then state (Petitioners' Brief, p. 13) that respondents (Brief in Opposition to Cert., pp. 4, 9) and the court below seem to urge that the availability of a state tort remedy somehow bars petitioners from obtaining redress under the Civil Rights Act.

This is an erroneous statement of respondents' position and an attempt by petitioners to cloud the issue. In respondents' Brief in Opposition to Certiorari, p. 4, respondents stated:

> "Petitioners are trying to establish a federal forum for matters that belong in a state court where complete redress is available.
>
> "If petitioners were to prevail, then every false arrest, unreasonable search, and false imprisonment would become a Civil Rights Act cause of action. This court in *Snowden v. Hughes*, 321 U. S. 1, 11, has disclaimed such intention for the Civil Rights Act . . ."

Respondents' Brief in Opposition to Certiorari, p. 9, further states:

> "Respondents have shown that the petitioners' com-

plaint does not state a cause of action under the Civil Rights Act * * *.

"Petitioners' remedy, if any, as stated by the Appeals Court (Petition, p. 16) is in the state courts."

Respondents have always contended that petitioners' complaint does not state a Civil Rights Act cause of action but merely an action under state law. This contention is entirely dissimilar from petitioners' claim regarding respondents' position on the availabilty of a state cause of action.

Petitoners' argument is irrelevant and immaterial to the issue herein.

Petitioners' Point 3 (Petitioners' Brief, p. 16) deals with "specific intent". Although petitioners allege that respondents have never raised this omission as a defense, petitioners discuss it because it was an important issue in *Screws* v. *United States*, 325 U. S. 91, (Petitioners' Brief, p. 16). Even if respondents did not raise the issue of "specific intent" below and even if petitioners had not introduced it into this case, respondents have the right to raise it now, as an appellee may urge anything shown by the record to sustain the judgment.

The *Screws* decision squarely holds that a statute which imposes liability for violations of rights guaranteed by the due process clause of the Fourteenth Amendment is subject to serious constitutional attack on the ground of vagueness, *unless "willfulness" in the commission of the wrong is included as an ingredient of responsibility.* While it is true that the *Screws* case involved a criminal statute, whereas the case at bar involves a civil statute, the principle of the *Screws* decision is nevertheless applicable here, because the *Screws* case held that without the word "willfully" the statute was too vague to apprise a person in advance of taking action whether his conduct would fall within or without the ambit of legality.

Not only criminal statutes, but civil statutes as well, have been held void for prescribing standards so vague and indefinite that men of ordinary intelligence must necessarily guess at their meaning and differ as to their application (*Champlin Refining Co.* v. *Commission*, 286 U. S. 210, 242; *Boshuizen* v. *Thompson & Taylor Co.*, 360 Ill. 160, citing numerous decisions of this court at page 169).

Another reason why the above rule applies both to civil and criminal statutes is that the question of vagueness or indefiniteness is not related to the difference in the degree of proof required for liability but pertains to the underlying issue of whether the statute has been violated at all. Without a definite standard, the decision of liability must be left to the differing views of courts and juries as each particular case arises. This vice is equally destructive of constitutional rights whether it exists in a civil statute or in a criminal statute.

Petitioners state (Petitioners' Brief, p. 18), "In any event, the rule of *Screws* is a rule of proof, not of pleading. No specific intent was laid in the *Screws* indictment. See 325 U. S. at 93."

Petitioners are playing on words. In 325 U. S. 93, this court said:

> "The indictment charged that petitioners, acting under color of the laws of Georgia, 'willfully' caused Hall to be deprived of 'rights, privileges, or immunities secured or protected' * * *."

The use of the word "willfully" in the indictment laid the basis for the proving of "specific intent". Without the word "willfully" in both the indictment and statute, under which the indictment was had, neither the statute nor indictment would have been valid (325 U. S. 101, 103).

B.

The allegations of the complaint as to custom or usage are substantially insufficient in law.

In their brief, petitioners fail to set forth any customs or usages under which respondent Pape acted. They cannot set forth any because there are none.

Petitioners' failure to argue custom or usage makes it unnecessary for respondents to do so. However, we believe it important to argue the point.

The complaint states (par. 17, R. 8) "At all times herein mentioned, it was, and it is now, the custom or usage of the Police Department of the City of Chicago" (setting forth supposedly illegal acts).

The complaint also states, (par. 7, R. 7) that the imprisonment of petitioner James Monroe was committed pursuant to the custom and usage alleged in par. 17.

The alleged customs and usages are so preposterous in themselves that this court might well take judicial notice of their nonexistence, especially in view of the express provisions of the state constitution and statutes and city ordinances, heretofore shown, to the direct contrary of such alleged customs and usages.

To treat the allegations of custom and usage as well pleaded requires the assumption of a complete breakdown of law and order in the City of Chicago at the time in question, October 29, 1958 (R. 3). This is contrary to common knowledge, and it is well settled that courts will take judicial notice of matters of common knowledge (31 C. J. S., Evidence, sec. 9, p. 510). Allegations of fact contrary to common knowledge and contrary to what a court will judicially notice, will not be sustained.

Thus the allegations as to custom and usage are not well pleaded because: (1) they are repugnant to the Constitu-

tion and statutes of Illinois and the ordinances of Chicago; and (2) they are contrary to facts of common knowledge within the judicial notice of courts.

It is well settled that a custom or usage directly repugnant to the express provisions of a statute or ordinance is void (*Wolfe* v. *Shell Petroleum Corp.*, 10 Cir., 83 F. 2d 425, 431).

It has also been held that proof of a custom which is repugnant to a statute is not admissible in evidence (*Central R. Co. of New Jersey* v. *Sekick*, 3 Cir., 38 F. 2d 968, 971; 25 C. J. S., Customs and Usages, sec. 10b, p. 91).

In *United States ex rel. Bongiorno* v. *Ragen*, 7 Cir., 146 F. 2d 349, 352, cert. den. 325 U. S. 865, the court took judicial notice that no state of public hysteria against crime existed in Chicago between July and October, 1933, which would deprive one accused of murder of due process of law.

This court may properly take judicial notice of the fact that no such reprehensible customs or usages as are set forth in the complaint existed in Chicago on October 29, 1958.

The complaint does not allege that police officers are able to commit with impunity the acts petitioners allege were committed by respondent Pape. Nor does the complaint allege that petitioners will be unable to obtain full redress in the local courts for the alleged wrongs inflicted upon them. That such redress is open to petitioners is heretofore shown by the Constitution and statutes of Illinois and ordinances of Chicago.

The allegations of the complaint as to custom and usage cannot be sustained for the further reason that they are not averred to have been of general notoriety within Chicago or Illinois, nor are any facts set forth from which such general notoriety can be inferred. Moreover, the

complaint does not allege that respondent Pape had knowledge of any of said customs or usages.

In *Langdon* v. *Kennedy*, 118 Neb. 290, 296, it was held that a custom or usage is insufficiently alleged by an averment that such a custom and usage existed, without alleging also that knowledge of the custom and usage on the part of the person charged with having acted pursuant thereto, or without setting forth facts showing such custom and usage to be of general notoriety.

25 C. J. S., Customs and Usages, sec. 32b, p. 125, states:

> "Where it becomes necessary to plead a custom or usage, all the essentials requisite to its validity and binding effect must be averred. Hence, the pleading should either aver knowledge on the part of the person to be charged or allege facts authorizing the conclusion that it was of such general notoriety that he will be presumed to have knowledge."

In the light of the foregoing, it is clear that the allegations of the complaint as to custom and usage are not well pleaded and should not be sustained.

II.

Petitioners' complaint fails to show that respondent City of Chicago committed any act that would make it liable under the Civil Rights Act.

Petitioners have devoted over 40 pages of their brief (Petitioners' Brief, pp. 21-65) attempting to prove that the respondent City of Chicago is liable under the Civil Rights Act for the actions of its police. Most of petitioners' argument centers around governmental immunity.

The question of governmental immunity does not enter into this case.

Section 1-15 of the Illinois Revised Cities and Villages Act (Ill. Rev. Stat. 1959, chap. 24, par. 1-15) provides in part:

> "In case any injury to the person or property of another is caused by a member of the police department of a municipality having a population of 500,000 or over, while the member is engaged in the performance of his duties as policeman, and without the contributory negligence of the injured person or the owner of the injured property, or the agent or servant of the injured person or owner, the municipality in whose behalf the member of the municipal police department is performing his duties as policeman shall indemnify the policeman for any judgment recovered against him as the result of such injury, *except where the injury results from the wilful misconduct of the policeman*" (Emphasis added).

Under the foregoing statute of Illinois, the City of Chicago is liable for judgments against its police arising out of the performance of their police duties except when such police are guilty of "wilful misconduct." Such statute removed from Chicago governmental immunity for the acts of its police except when such acts are the result of "wilful misconduct."

Such statute is in conformity with the rule:

> "• • • a municipality is not liable for the acts of its policemen which are ultra vires and not within the scope of their functions. 'i.e. for the unlawful acts committed ultra vires, and not *colore officii*, in the known and wilful violation of law' " (McQuillen Mun. Corps., 3rd ed. (1950) Police Officers, sec. 53.79, p. 358).

Petitioners seek to avoid the rule of law that a municipality is not responsible for the acts of its police which are contrary to laws designed to prevent such acts on the grounds that such acts are ultra vires and beyond the scope of police employment by claiming that, "• • • There

is no longer any doubt that when an officer of the state is engaged in his official duties, his act is the state's act for purposes of the Fourteenth amendment and for purposes of the Civil Rights Act. *Screws* v. *United States*, 325 U. S. 91; *Williams* v. *United States*, 341 U. S. 97." (Petitioners' Brief, p. 51).

The *Screws* and *Williams* cases did not hold the rule set forth by petitioners. These cases hold that the acts of a state officer were under "color of law" or "pretense of law."

The holdings in those cases did not touch on municipal liability, but were confined to the liability of the individual defendants.

If this court holds the *Screws* and *Williams* cases inapplicable or overrules them on the grounds we have heretofore set forth, then the liability of Chicago will not have to be decided because no Civil Rights Act cause of action exists.

If this court does not so hold, and adopts petitioners' theory that the act of respondent Pape, no matter how wrongful and how violative of the Constitution and laws of Illinois and the ordinances of Chicago, binds Chicago and makes it directly liable therefor, then Chicago and every other municipality in the United States is open to Civil Rights Act liability through no action of its own and based on action contrary to its own ordinances and the laws of the state it is a part of.

Such liability would amount to depriving Chicago and every municipality of its property without due process of law. It would establish a theory that municipalities, no matter how innocent of wrongdoing they might be, and no matter what ordinances they might enact, or laws their state might enact to prevent police from wrongdoing, would be liable for the wrongful acts of their police.

Such municipal liability would also encourage unlawful police conduct because the victim of such conduct would not seek to hold the policeman liable but the municipality. It would encourage collusion between individuals and the police to the financial detriment of the municipality. Venal policemen would be encouraged to commit unlawful acts knowing suit would be filed against the municipality instead of them.

The case at bar is now before this court, evidently because different circuits of the United States Courts of Appeals have differed on the proposition of whether every act of an officer of the state is the state's act for purposes of the Civil Rights Act. Petitioners have assumed the question in issue and left nothing for this court to decide.

Petitioners by introducing extraneous matter not of record (Petitioners' Brief, p. 58) seek to introduce in this case an irrelevant issue. They attempt to show that federal courts will not be inconvenienced by accepting police tort cases as Civil Rights Act cases because of the small number of such cases filed in federal courts. We suggest that the small number of such cases filed in federal courts is due to the fact that the bar recognizes that such cases are not Civil Rights Acts cases but state cases.

In order to bolster their immaterial argument that suits against police officers of Chicago would not be a financial hardship on Chicago, petitioners libel the police department of Chicago by quoting a derogatory statement from a magazine about the police department (Petitioners' Brief, p. 62). Respondents object to such quote, first, because it is not true and, second, because it is not part of the record.

In furtherance of their immaterial argument, petitioners state that in 1959 the police of Chicago made 207,000 physical arrests and that only 31 suits were filed as a re-

sult thereof (Petitioners' Brief, p. 62). Only 31 suits from 207,000 arrests certainly shows that the police of Chicago are performing their police duties legally and efficiently and belies petitioners' quoted magazine statement.

Conclusion.

For all of the foregoing reasons, it is respectfully submitted that the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, striking petitioners' complaint and dismissing the suit, be affirmed.

Respectfully submitted,

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